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The Right of Reattribution

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The Right of Reattribution

Brian L. Frye[1]

For this my son was dead, and is alive again; he was lost, and is found.

And they began to be merry.[2]

ABSTRACT

Usually, authors love their works as their children: fiercely and unconditionally. Indeed, many authors refer to their works as their "children," and some show far more solicitude for their aesthetic children than their actual ones. Of course, authors can also be cruel to their works. As William Faulkner famously observed, "In writing, you must kill all your darlings."[3] But even such merciless culling doesn't prevent authors from loving what survives. If anything, their love only deepens with each sacrifice.

But even the filial bond can be broken. Many disappointed parents have disowned their prodigal children. Sometimes the relationship can be mended, but often it can't. Why should authors be any different? Authors and their works can also grow apart. Perhaps the work was a product of the author's youth, long since forgotten. "When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things."[4] Perhaps the author adopted a new style, and no longer feels a connection to older work. Or perhaps the author is just ashamed of a particular work. Happy authors all love their works in the same way, but unhappy authors hate their works in different ways, for their own reasons. So, what should be done with prodigal works? Under the Copyright Act, authors have the exclusive right to publish their works, but no obligation to publish. Plenty of works fall into desuetude for lack of public interest. But what about works the public loves and the author despises?

In some countries, copyright gives authors a "right to withdraw" works they disapprove. While the United States has no right to withdraw, it does have a practical equivalent. Authors can simply stop publishing a work, and refuse to allow anyone else to publish it. [5] Of course, existing copies will still circulate. Still, restricting the

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2. *Luke* 15:24.

3. In fact, Faulkner probably cribbed the expression from Arthur Quiller-Couch, On the Art of Writing (1913-14) ("Murder your darlings."). Ironically, the expression has become a cliche. *See generally* Forrest Wickman, *Who Really Said You Should "Kill Your Darlings"?*, SLATE (Oct. 18, 2013 1:09PM), https://slate.com/culture/2013/10/kill-your-darlings-writing-advice-what-writer-really-said-to-murder-your-babies.html.

4. 1 *Corinthians* 13:11.

5. *See* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.")

supply of a work can still help reduce its public profile. After all, out of sight, out of mind.

But there's a problem. The whole purpose of copyright is to encourage authors to create works of authorship for the public to consume.[6] Indeed, the government uses copyright to pay authors to produce works.[7] When authors refuse to publish works, they're going back on the bargain. Of course, it probably doesn't matter if authors refuse to publish works no one wants to consume anyway. But it's more troubling if authors refuse to publish works consumers want, leaving money on the table. Sometimes, authors refuse to publish a work because it harms their brand. In any other market, they could just sell the product line to someone else. But attribution sticks like glue, so it's rational for authors to prohibit publication, so long as the loss of potential profits is offset by gains in goodwill. The loser is the public, which pays a higher price for access to the work.

Thankfully, there's a solution: the right of reattribution. The transaction cost is the stickiness of the right of attribution. So, the government can easily solve the market failure by making attribution alienable. Presto! The author can divest the objectionable work by reattributing it to a different author. The public will have access to the work at the market clearing price. And market equilibrium will be restored. Hallelujah!

6. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.'").

7. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in `Science and useful Arts.'").

I. COPYRIGHT AS PROPERTY

The dominant metaphor for property is a "bundle of sticks," each stick representing a right the owner can alienate.[8] For better or worse, everyone assumes copyright is a kind of property.[9] Accordingly, copyright is also a bundle of sticks, each stick representing an exclusive right to use a work of authorship. Copyright owners can use the bundle however they like, keeping the whole thing, transferring different rights to different people, or transferring the entire bundle all at once.

Copyright ownership initially vests in the author of a work, and gives the author certain rights to control how people use the work.[10] Specifically, it gives authors the right to control the reproduction, adaptation, distribution, and presentation of the work.[11] Most authors care about attribution more than anything else.[12] But the Copyright Act doesn't actually give most of them an attribution right.[13] On the contrary, the Copyright Act gives authors a bunch of economic rights.[14] Still, authors can use copyright to enforce a de facto attribution right, by prohibiting the use of their works without attribution.[15] At least until they transfer copyright ownership to someone else, or their work falls into the public domain.

Not so fast. Often, authors can effectively assert rights the law doesn't recognize, but their community does.[16] In theory, people can attribute public domain works to themselves.[17] But in practice, good luck. The plagiarism police prohibit misattribution, even when copyright doesn't.[18] If you falsely claim authorship of a public domain work, copyright has nothing to say about it, but the plagiarism police will bite.[19] Curiously, if you falsely claim authorship of a work you paid someone to ghostwrite for you, the plagiarism police will growl, but usually bite their tongues.[20]

Anyway, as a practical matter, authors have a *de facto* attribution right that emanates from the penumbra of copyright law and social practice.[21] When authors sell or license the copyright in their works, they typically expect the buyer or licensee to attribute the work to them. If someone uses a work without attributing it, the author can use the threat of copyright infringement litigation or social sanction to compel attribution. Most copyright buyers want to attribute the works they buy to

8. *See* United States v. Craft, 535 U.S. 274, 278 (2002) ("A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property.")

9. *See, e.g.*, Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 144 (2011) ("Copyright scholars habitually compare copyright to property in land…").

10. *See* 17 U.S.C. §§ 106, 201 (2018).

11. 17 U.S.C. § 106 (2018).

12. *See* Brian L. Frye, *A License to Plagiarize*, 43 U. ARK. LITTLE ROCK. L. REV. 51, 51-52 (2021).

13. The Visual Artists Right Act of 1990 gave the authors of certain "works of visual art" a limited and waivable attribution right. *See* 17 U.S.C. § 106A (2018).

14. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

15. *See* Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (1932).

16. *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34-35 (2003).

17. *See id.* at 31.

18. *See* Brian L. Frye, *Plagiarize This Paper*, 60 IDEA 294, 302 (2020) [hereinafter *Plagiarize This Paper*].

19. *See id.* at 307.

20. *See id.* at 321.

21. Brian L. Frye, *Plagiarism is Not a Crime*, 54 DUQ. L. REV. 133, 138 (2016).

their original authors. After all, the attribution is usually part of the work's appeal, and often the better part of its value.

Nevertheless, the attribution right is just one more stick in the copyright bundle, and ought to be every bit as transferable as the others. The Copyright Act explicitly authorizes copyright owners to transfer the exclusive rights of reproduction, adaptation, distribution, performance, and display granted by Section 106.[22] If the attribution right is one of the exclusive rights of copyright owners, then they ought to be able to transfer it as well.

Some will insist attribution is inalienable and can't be transferred.[23] Nonsense! We allow authors to transfer attribution all the time. After all, what is ghostwriting but a transfer of attribution?[24] Not to mention works made for hire created by employees and attributed to their employer.[25] Historically, when Hollywood directors were unhappy with a motion picture and didn't want to be associated with it, they could insist on an attribution to "Alan Smithee," the imaginary director of prodigal movies.[26] If authors can transfer the right of attribution in some contexts, then they ought to be able to transfer it in any context they like. Anything else would violate the sole and despotic dominion which copyright owners claim and exercise over their works, in total exclusion of the right of any other individual in the universe, and we can't have that.[27]

II. PRODIGAL WORKS

Why would an author ever want to alienate authorship? Well, it can be valuable, and authors like money just as much as anyone else. Many authors are more than happy to transfer authorship, for the right price. Witness the robust, if somewhat clandestine market for ghostwritten works. Not to mention the more entrepreneurial essay mill market.[28] If you want someone to create a work and allow you to take credit for it, there's no shortage of authors happy to oblige.[29]

But money isn't the only reason authors want to alienate authorship. Sometimes, authors just don't want to be associated with a work anymore.[30] Maybe they think it reflects poorly on their skills. Maybe they think it reflects poorly on their character. Maybe they want to divest themselves of worldly possessions. Maybe

22. 17 U.S.C. § 201(d) (2018).

23. *See, e.g.*, Richard Heppner (@ RLHeppner), TWITTER (MAR. 21, 2020), https://twitter.com/RLHeppner/status/1373651682534510592?s=20.

24. A great example of this is John F. Kennedy, Jr. who won a Pulitzer Prize for PROFILES IN COURAGE (1956), which was actually written by his speechwriter Ted Sorensen. Craig Fehrman, *'I Would Rather Win a Pulitzer Prize Than Be President'*, POLITICO (Feb. 11, 2020 05:05AM), https://www.politico.com/news/magazine/2020/02/11/john-f-kennedy-pulitzer-obsession-consumed-him-113452.

25. 17 U.S.C. § 201(d).

26. Amy Wallace, *Name of Director Smithee Isn't What It Used to Be*, L.A. TIMES (Jan. 15, 2000 12:00AM) https://www.latimes.com/archives/la-xpm-2000-jan-15-ca-54271-story.html.

27. *Cf.* WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 407 (1763) (recognizing copyrights for authors.)

28. *See* Michel Anteby & Nicholas Occhiuto, *Stand-in Labor and the Rising Economy of Self*, 98:3 SOCIAL FORCES 1287, 1290 (March 2020).

29. *See, e.g.*, Brian L. Frye, *Illegitimacy of Plagiarism Norms* (March 23, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559145 (commissioning a law review article titled "Illegitimacy of Plagiarism Norms" from an essay mill, for $10 a page).

30. *See, e.g., Statement from Dr. Seuss Enterprises*, SEUSSVILLE (March 2, 2021), https://www.seussville.com/statement-from-dr-seuss-enterprises/ [hereinafter Dr. Seuss].

they stop believing in copyright ownership. Or maybe they just want to make an artistic statement.[31]

Anyway, the point is that at least some authors do want to transfer their attribution rights, or at least not own them anymore. Should we let them? Copyright law seems to be indifferent. After all, attribution typically isn't protected by copyright in the first place.[32] If authors want to disavow their attribution right in a work, presumably copyright just doesn't care. But the plagiarism police do.[33] They grudgingly allow authors to transfer their attribution right when they create a work, as in the context of ghostwriting and works made for hire. But they would never allow authors to disavow or transfer authorship of a published work. Why not? It's hard to say. They certainly seem to fetishize authorship. They don't like ghostwriting, and transferring attribution would surely be a bridge too far. But maybe there's something more at stake? Who knows.

III. THE RIGHT OF WITHDRAWAL

In some countries, regretful authors are in luck, because the moral right of withdrawal enables them to disclaim authorship of a work.[34] In some countries, it even enables them to remove copies of the work from the market.[35]

Moral rights are "non-economic" rights that enable authors to control the use of the works they create in certain ways.[36] The Berne Convention requires the adoption of certain moral rights, including the rights of attribution and integrity.[37] The right of attribution enables authors to require or disclaim attribution, under certain circumstances. Specifically, authors can compel attribution when someone uses a work they created without attributing it to them, and can disclaim attribution when a particular copy of a work is damaged or distorted, and no longer reflects their authorial intentions.[38] The right of integrity enables authors to protect the integrity of the works of authorship they created, and prevent the destruction or distortion of those works.[39] Unsurprisingly, both are limited, and apply only in certain circumstances.[40] But they provide an important way for authors to police their reputation and legacy.

But some countries have created additional moral rights, including a right of withdrawal, which enables authors to not only disown a work, but also prohibit its distribution.[41] For example, French copyright law gives authors a moral right of withdrawal or retraction, *le droit de repentir ou de retrait*.[42] This right enables

31. *See, e.g.,* Brian L. Frye, *A Legal Scholarship Jubilee* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691346 (giving away attribution rights to assorted articles).
32. *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34-35 (2003).
33. *See generally Plagiarize This Paper*, *supra* note 18 (indicating that copyright infringement does not speak to attribution rights.)
34. William Strauss, *Study No. 4: The Moral Right of the Author*, U.S. COPYRIGHT OFFICE 109, 117-19 (July 1959), https://www.copyright.gov/history/studies/study4.pdf.
35. *See id.*
36. *See id.* at 115.
37. *Id*. at 115-16.
38. *Id*. at 116.
39. *Id.*
40. *Id.*
41. *Id.* at 117-119.
42. CODE DE COMMERCE [C. COM.] art. L121-4 (Fr.)

authors to correct or retract their work after publication.[43] Similar rights of withdrawal exist under Italian and German law.[44]

Don't get too excited. What the government gives, it can take away, or at least whittle down to nothing. The few countries that have created a right of withdrawal have also imposed strict limits on its use.[45] For example, the French right of withdrawal requires authors to indemnify copyright transferees for any economic losses caused by the correction or retraction.[46] In other words, the right of withdrawal amounts to the right to rescind or amend a copyright transfer, in exchange for paying damages. You might as well call it a right of efficient breach.

In any case, some countries allow authors to disavow works after publication.[47] Or at least, they allow authors to try. Obviously, there's no guarantee an author's exercise of the right of withdrawal will take. After all, withdrawing copies from the market is hard. And preventing people from attributing a work to its original author is even harder. Go ahead and tell people they can't attribute a work to the person who created it. Some of them might play along. But most of them won't. Hell, a lot of people probably won't even understand your request. How can you expect them not to attribute a work to its author, when the attribution would be truthful?

Maybe authors should have other options? The universe of moral rights is broad and can take many forms. Some people have suggested that we should recognize a "right to destroy."[48] Ok, sure. From a copyright perspective, it seems unproblematic, at least when it comes to copies of unpublished works. If you create something, you can delete it. If privacy law says anything, it says you aren't obligated to publish private documents. But what about published works? Should authors have the right to destroy them? What would it even mean? You can destroy a particular copy, especially if you own it. But destroying a copy doesn't do anything to the intangible work it embodies, which can exist in other copies, or at least in memory. And in any case, you certainly can't destroy copies of a work that belong to someone else.

IV. MORAL RIGHTS UNDER UNITED STATES LAW

Unfortunately, United States copyright law only gives authors very limited moral rights, and doesn't create a right of withdrawal. The Copyright Act gives some authors of "works of visual art" certain limited rights of attribution and integrity.[49] But it doesn't give them a right of withdrawal. And it doesn't give them any other way to remove a work from the market, or disavow authorship of a work they've already published. Bummer.

It's no surprise. The United States has always resisted moral rights.[50] Hell, the United States resisted the Berne Convention longer than almost any other country.[51]

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43. Strauss, *supra* note 34, at 117.
44. CODICE CIVILE [C.C.] art. 142-143 (It.); BURGERLICHES GESENTZBUCH [BGB] [CIVIL CODE] art. 33 (Ger.).
45. Strauss, *supra* note 34, at 123-125.
46. *Id.*at 122.
47. *Id.* at 117-119.
48. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 785 (2005).
49. 17 U.S.C. § 106A (2018).
50. *See* Amy Adler, *Against Moral Rights,* 97 CAL. L. REV. 263, 266 (2009).
51. *See* Dennis S. Karjala, *United States Adherence to the Berne Convention and Copyright Protection of Information-Based Technologies*, 28 JURIMETRICS J. 147, 147 (1988).

And when it finally, grudgingly capitulated to Berne by passing the 1976 Act, it still refused to adopt moral rights, or even admit that it was capitulating.[52]

The Visual Artists Right Act of 1990 created rights of attribution and integrity, but only prospectively and only for certain authors.[53] What's more, it made them waivable, which is tantamount to saying they don't exist, in many of the cases where they would matter. After all, if authors have to bargain for VARA rights, they're almost certain to lose, unless they have enough market power to demand anything they want. Moreover, when artists litigate VARA claims, they usually lose. And on the rare occasions they win, it's usually because the defendant is such a jerk, it doesn't matter what the law says.

V. COPYRIGHT AS AN ECONOMIC RIGHT

At least in theory, consumer welfare is the alpha and omega of United States copyright law. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."[54] Copyright gives authors exclusive rights in the works they produce only in order to encourage them to produce more works.[55] Sure, authors benefit from copyright ownership, because it enables them to internalize some of the positive externalities or "spillovers" associated with the works they create.[56] And as a practical matter, authors can even use copyright to achieve non-economic goals, like controlling how people use the work.[57] But the fundamental purpose of copyright is to benefit consumers, by giving authors salient economic incentives to produce works they think consumers will want.[58]

As a consequence, creation and distribution go hand in hand. It doesn't matter what authors create, unless they make it available to the public. Of course, authors usually have every incentive to make their works available. Historically, the bottleneck on access was the cost of reproduction and distribution. Sure, it's hard work to create a work of authorship. But it was even more expensive to make copies, distribute them to retailers, and make them available to consumers. Not to mention publicizing the work, so consumers actually know about it.

Today, many of those costs have fallen to zero, or the practical equivalent.[59] What does it cost to reproduce and distribute a digital work? Nothing, really, at least

52. *See id.* at 152.
53. 17 U.S.C. § 106A.
54. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).
55. *See, e.g.,* Sony Corp. of America v. Universal City Studios, Inc., 464 U. S. 417, 429 (1984) (holding that copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").
56. *See generally* Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 258-59 (2007) (explaining how some benefits are both personal and serve to "spillover" to others in a common environment.)
57. *See, e.g*., Colleen V. Chien, *Beyond Eureka: What Creators Want (Freedom, Credit, and Audiences) and How Intellectual Property Can Better Give It to Them (by Supporting Sharing, Licensing, and Attribution*), 114 MICH. L REV. 1081, 1093 (2016).
58. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
59. *See generally* Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 461 (2015) (explaining that, due to the rise of the Internet, cost of reproduction and distribution is now effectively zero.)

on the margins. At least in theory, the internet could be the universal library, a limitless repository of everything everyone has ever created and published.[60]

Of course, it's not. Sure, it does pretty well. At least, better than anything that has ever existed before. But the internet has plenty of blind spots. Many historically important works are difficult or impossible to find in a digital format. Why? Mostly transaction costs. The marginal cost of reproducing and distributing a work is zero, but the fixed cost isn't. And copyright can be a cost, as well as an incentive. Plenty of copyright owners prohibit the distribution of the works they own, for plenty of different reasons. Maybe they want a better deal. Maybe they want a new fan base. Maybe the work just isn't valuable enough to bother distributing. Maybe they even want to suppress the work? It's hard to say.

The Supreme Court has recognized as much. The Copyright Term Extension Act of 1998 retroactively extended the copyright term by 20 years.[61] And in *Eldred v. Ashcroft*, the Supreme Court held that encouraging the distribution of works of authorship was a rational basis for the retroactive extension.[62] On one level, that's obviously wrong. Is it theoretically possible that extending the copyright term could encourage distribution of copyrighted works? Sure, why not. But everyone knew it wasn't actually true, and that retroactively extending the copyright term kept a huge number of works out of print, as Justices Stevens and Breyer both observed in their dissents.[63]

If the Copyright Term Extension Act was intended to increase the distribution of copyrighted works, it was a colossal failure, and *Eldred* just perpetuated that failure.[64] After all, Eldred represented a group of plaintiffs in the business of distributing public domain works. They wanted to distribute works that were out of print and largely unavailable, and relied on the public domain to avoid infringement liability.

But the Supreme Court didn't care. It ignored Eldred's objections, and held that Congress can extend copyright protection willy-nilly, so long as a public benefit is at least conceivable. "Is a dream a lie, if it don't come true, or is it something worse that sends me down to the river, though I know the river is dry?"[65]

And yet, maybe the Supreme Court was still thinking about consumers? After all, the works at issue in *Eldred* were out of print because consumers didn't want them. If there were any demand, presumably the copyright owners would have made them available. Why should Congress or the Court worry about the unavailability of works no one wants anyway? Maybe they both just focused on the historical works consumers do want, and observed that they were still widely available. If the goal of the so-called "Mickey Mouse Protection Act" was to ensure access to Mickey Mouse products, it succeeded in spades.

Anyway, the Supreme Court clearly has no interest in questioning the wisdom of copyright owners, when it comes to the use of their works or the lack thereof. It

60. *Cf*. JORGE LUIS BORGES, THE LIBRARY OF BABEL (1941).

61. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 512 (1999)).

62. *See* Eldred v. Ashcroft, 537 U.S. 186, 207 (2003).

63. *See id.* at 226-27 (Breyer, J., dissenting); Eldred v. Ashcroft, 537 U.S. at 244 (Stevens, J., dissenting).

64. *See generally* Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11-4 J. EMPIRICAL LEGAL STUDIES, 829, 830 (2014) (questioning the rationale in *Eldred* that longer copyright terms would encourage holders to invest in restoration and public distribution of their works.)

65. BRUCE SPRINGSTEEN, THE RIVER (Columbia Records 1980).

assumes copyright owners are rational economic actors who will try to maximize the economic value of the works they own, by making them available to consumers, whenever there is demand. On that assumption, most judicial interventions would be foolish. Why should a court second-guess a copyright owner's assessment of how to use their property?

Of course, the Court's assumption is comically wrong. Copyright owners aren't rational economic actors, any more than anyone else. And there are plenty of transaction costs associated with copyright that copyright owners ignore, because they are externalities. It's obvious that copyright could be more efficient. It's obvious that copyright is often pure transaction cost. And it's obvious that Congress and the courts could make copyright more efficient.

But for the moment, let's just accept the Court's assumption that copyright owners are rational economic actors, and ask what it implies for copyright policy. If copyright makes the distribution of works of authorship more efficient, how can the government increase its efficiency? I see a problem the government can solve.

VI. THE RIGHT OF REATTRIBUTION

Sometimes, copyright owners fall out of love with their works. It's sad, but it happens. Often, they can part ways amicably by transferring the offending work to someone else, who loves it more. Problem solved!

But when the copyright owner is the author of the work, the problem is harder to solve. Authors can transfer copyright ownership of their works to others, but they can't transfer authorship.[66] At least not yet.

This is a problem, because economically rational authors often have a lot of balls in the air. An author who owns multiple works has to consider not only the rational use of each individual work, but also the use of the works in relation to each other, and the effect that any particular work might have on the value of the other works. Sometimes, association with one work can reduce the value of the other works.[67] Other copyright owners would just transfer the offending work. But authors don't have that option. They are associated with the pariah work, whether they like it or not. And it can hurt their brand.

The obvious response is to use copyright to suppress the offending work.[68] After all, copyright doesn't require publication. Copyright owners can sit on a work as long as they like, and there's nothing anyone can do about it, until the copyright term ends. Authors of pariah works have every incentive to suppress them, in order to protect the value of their brand and maximize the value of their other works, even if consumers want the pariah work. The inefficiency is palpable.

Thankfully, the government can easily solve this market failure by creating a right of reattribution. The problem is that some authors no longer want to be associated with particular works they created, but the Copyright Act provides no way for them to alienate authorship of those works. The solution is a right of reattribution, enabling authors to reattribute those works to people who do want them.

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66. *See Plagiarize This Paper*, *supra* note 18, at 325.

67. *See generally* Dr. Seuss, *supra* note 30 (showing how externalities play a role in copyright owners deciding to continue to publish or distribute their work.)

68. *See generally id.* (indicating one example where a copyright holder chose to stop publishing certain works, but also prevented others from publishing the work).

For example, imagine an author who created many popular works of authorship, some of which come to be seen as racist. It's a problem for the author, who has incentive to suppress the racist works, in order to protect the value of the other works.[69] But that's a problem for racist consumers, who like the racist works. A right of reattribution would neatly solve the problem by enabling the author to reattribute the racist works to a racist author. Oh, the efficiency!

VII. TRIVIAL OBJECTIONS

Of course, some will say this is impossible.[70] I disagree. Far stranger things have happened before and will probably happen again. Still, I'll consider three objections. First, that Congress would never create a right of reattribution. Second, that a right of reattribution wouldn't work, because people would ignore it. And third, that a right of reattribution would violate free speech.

It's true, Congress probably won't create a right of reattribution. But that's only because Congress doesn't do much of anything, and seems to love silly laws more than sensible ones.[71] According to the Supreme Court, Congress can do pretty much anything it likes, when it comes to copyright.[72] Surely that includes a right of reattribution? After all, Congress has already created an attribution right. A reattribution right isn't really even a new right, it's just making an already existing right alienable. And the Copyright Act loves alienable rights.

It's also true that many people would ignore the right to reattribute. But we ignore so many rights, why should the reattribution right be any different? Most people don't care about art anyway.[73] Why should they care how it's attributed? A right observed in the breach is still observed, more or less. People ignore laws all the time.[74] They are still laws. If the law says reattribution is one of the exclusive rights of a copyright owner, who cares what anyone else thinks? And in any case, many people already seem to think reattribution is fine. After all, ghostwriting is copacetic, so long as you're a celebrity, and not a student.

And it's true that many people will assert a First Amendment right to attribute works to their original authors, rather than their reattributed authors. As always, you can't avoid the tension between copyright and free speech. But why is this problem special? As the Supreme Court observed in *Eldred*, there is no tension between copyright and the First Amendment, because "copyright's limited monopolies are

69. *See id.;* Mark Pratt, *6 Dr. Seuss books won't be published for racist images*, ASSOCIATED PRESS (Mar. 2, 2021), https://apnews.com/article/dr-seuss-books-racist-images-d8ed18335c03319d72f443594c174513.

70. *See, e.g.,* Michael Morley (@michaelmorley11), TWITTER (Mar. 21, 2021), https://twitter.com/michaelmorley11/status/1373655755388227586?s=20.

71. *See, e.g.,* Onion Futures Act, Pub. L. No. 85-839, 72 Stat. 1013 (1958) (codified as amended 7 U.S.C. § 13-1 (2018)).

72. *See generally* Eldred v. Ashcroft, 537 U.S. 186, 205 (2003); Golan v. Holder, 565 U.S. 302, 308 (2012).

73. *See* generally Vitaly Komar & Alex Melamid, *The Most and Least Wanted Paintings*¸ DIA ART (1995), https://awp.diaart.org/km/index.html (showing both the most wanted paintings in each country, and the least wanted paintings.)

74. *See, e.g.,* Smokey Bear Act, 18 U.S.C. § 711 (1952) (repealed 2020); *It is No Longer a Crime to Impersonate Smokey Bear*, LOWERING THE BAR (Dec. 31, 2020), https://loweringthebar.net/2020/12/it-is-no-longer-a-crime-to-impersonate-smokey-bear.html.

compatible with free speech principles."[75] After all, "copyright's purpose is to promote the creation and publication of free expression."[76] And the fair use doctrine provides a First Amendment "safety valve" by making critical uses noninfringing. If people want to object to reattribution, they can always rely on fair use and hire a lawyer.[77]

VIII. A MODEL REATTRIBUTION STATUTE

When you propose a new law, people typically expect you to tell them what it should say. I object. I'm a law professor. My job is to solve problems in theory. I prefer to leave solving problems in practice to Congress. After all, they're the experts, or so I'm told.

Still, it's interesting to think about how Congress could create a right of reattribution, so I'll provide some suggestions.

The simplest and most elegant way to create a right of reattribution would be to delete a few provisions in Title 17, Section 106A, which codifies the Visual Artists Rights Act of 1990. Section 106A creates an attribution right, but limits its exercise to the "author" of a "work of visual art" and prohibits transfer of the right. Specifically, it provides:

(b) Scope and Exercise of Rights.—

Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.[78]

And it also provides:

(e) Transfer and Waiver.—

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.[79]

In order to create a reattribution right, Congress only needs to delete the phrase " may not be transferred, but those rights" from 17 U.S.C. § 106A(e)(1), making the attribution right transferable, and delete 17 U.S.C. § 106A(b) in its entirety, enabling any copyright owner to assert the attribution right. Easy peasy.

Of course, this solution has two weaknesses. First, it doesn't actually create a right of reattribution, only a right to transfer the right of attribution. Accordingly the reattributing author couldn't assert the reattribution right themselves, but would

75. Eldred v. Ashcroft, 537 U.S. 186, 220-21 (2003) ("The First Amendment securely protects the freedom to make— or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them."). This footnote is dedicated to Neil Turkewitz, who loves this quotation more than anyone else I know.

76. *Id.*

77. *Cf*. LAWRENCE LESSIG, FREE CULTURE. 187 (2004) ("Fair use is the right to hire a lawyer.")

78. 17 U.S.C. § 106A(b).

79. 17 U.S.C. § 106A(e)(1).

have to rely on the new copyright owner to assert their attribution right. Second, this right of attribution would only belong to authors of "works of visual art," leaving the authors of many wayward works out in the cold.[80]

So, the simple solution is promising, but ultimately unacceptable. It can solve market failures caused by the undesirable attribution of works of visual art. But there are so many more market failures waiting to be solved. Efficiency is our goal, and we can do better.

In the alternative, Congress could add a right of reattribution to Section 106A. After all, the right of reattribution is at least arguably a moral right, like the rights of attribution and integrity already provided by Section 106A. Congress could amend Section 106A by adding a new Section 106A(f), reading:

(f) the author of a work—

(1) shall have the right—

(A) to disclaim authorship of that work

(B) to transfer the right to claim authorship of that work, and

(C) to prevent the use of his or her name as the author of any disclaimed work

This would elegantly avoid the problems with the simpler fix, by avoiding the prohibition on transfer, and well as the restriction to works of visual art. To underscore the constitutionality of the right of reattribution, Congress might also consider adding an explicit fair use exemption, like the one included in Section 106A(a). But it's probably unnecessary, because the Supreme Court has consistently held that fair use is a constitutional limit on copyright protection.[81]

Of course, Congress could also create a right of reattribution by amending Section 106, instead of Section 106A. This would have the virtue of recognizing that the right of reattribution is fundamentally an economic right, expressing the economic interests of a rational author and copyright owner, like the other Section 106 rights. Or Congress could create a new Section 106B, specifically for the right of reattribution. After all, it would be *sui generis*. What better reason for a new section?

Anyway, the point is that there are lots of ways Congress could solve the market failures caused by prodigal works. Far be it from me, a mere law professor, to

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80. The Copyright Act provides the following definition of a "work of visual art":

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

17 U.S.C. § 101 (2018).

81. *See generally* Eldred v. Ashcroft, 537 U.S. 186, 205 (2003); Golan v. Holder, 565 U.S. 302, 308 (2012).

tell Congress which method to choose. I'm just the messenger, pointing out a problem that many members of Congress seem quite upset about and making helpful suggestions about how they can solve it.

IX. CONCLUSION

Usually, it's hard to make the law more efficient. But sometimes, it's easy. Creating a right of reattribution is an easy way to make copyright more efficient, by solving transaction costs that might otherwise keep works consumers want out of print.

As I now beheld the robe, it seemed to me suddenly to become a mirror-image of myself: myself entire I saw in it, and it entire I saw in myself, that we were two in separateness, and yet again one in the sameness of our forms.[82]

82. THE HYMN OF THE PEARL (Hans Jonas trans. 1958).